No. 92-1402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

C & A Carbone, Inc., Recycling Production of Rockland, Inc., C & C Realty, Inc. and Angelo Carbone,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF OF *AMICI CURIAE* CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN FOREST & PAPER ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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July 16, 1993

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MOTION OF CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN FOREST & PAPER ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.3 of this Court, and for the reasons set forth in the accompanying statement of their interests, the Chemical Manufacturers Association ("CMA"), American Automobile Manufacturers Association ("AAMA"), American Forest & Paper Association ("AFPA"), and National Association of Manufacturers ("NAM"), hereby respectfully move, with the written consent of all parties, for leave to file the accompanying joint brief as *amici curiae* in support of Petitioners. A copy of

the parties' written consent has been filed with the Clerk of the Court.

Respectfully submitted,

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July 16, 1993

QUESTION PRESENTED

Whether a town ordinance that prohibits, without a valid non-protectionist purpose, the importation of "unacceptable" waste and the exportation of "acceptable" waste constitutes an improper burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

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INTERESTS OF THE *AMICI CURIAE*

The Chemical Manufacturers Association ("CMA") is a nonprofit trade association whose member companies account for more than ninety percent of the basic industrial chemicals produced in the United States. The American Automobile Manufacturers Association ("AAMA") represents the domestic automobile manufacturers. Its members, Chrysler

Corporation, Ford Motor Company, and General Motors Corporation, produce approximately eighty-one percent of all U.S.-built passenger cars and light trucks. The American Forest & Paper Association ("AFPA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. Its member companies employ 1.4 million people, generate annual sales of $200 billion, and account for over seven percent of the nation's total manufacturing output. The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods.

Together and individually, these four Associations represent member companies that operate chemical plants, automobile assembly plants, pulp and paper mills, and other manufacturing and production facilities in every state in the country. These facilities generate both hazardous and non-hazardous waste in the course of their operations. Many of the member companies also own or operate wastewater treatment facilities, private landfills, and other waste disposal operations to treat and dispose of the waste that they (and, in some circumstances, their customers) generate. In most cases, these are interstate operations, and the companies' waste disposal and treatment facilities — or others that they contract to use — are based in locations different from those in which the waste itself is generated.

The foregoing Associations therefore have a substantial interest in the "flow control" legislation at issue in this appeal. They file this joint brief as *amici curiae* in support of Petitioners, with the written consent of all parties.

SUMMARY OF ARGUMENT

Two sections of the Clarkstown ordinance are at issue in this appeal, and both are unconstitutional. Section 5 flatly prohibits the importation of "unacceptable" waste.[1] This provision directly discriminates against interstate commerce involving out-of-town waste. It therefore violates the Commerce Clause[2] under the express terms of this Court's prior decisions, including two decisions announced last Term.

Section 3 flatly prohibits the exportation of "acceptable" waste. This provision similarly burdens the free flow of interstate commerce. As an export restriction, it differs in kind from the import restriction imposed by Section 5 and the similar restrictions struck down by the Court last Term, but the anticompetitive and unconstitutional purpose and effect are the same. The only real difference is the locus of the burden. Indeed, the Town has neither demonstrated nor attempted to demonstrate a valid, non-protectionist purpose for the export prohibition embodied in Section 3, and the only legitimate purposes that one might generously infer either are affirmatively disserved by the provision or can be served more effectively by less burdensome alternatives. In any event, no asserted governmental purpose, whether legitimate or not, can justify a categorical prohibition on exportation with such a

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[1] The ordinance defines "unacceptable waste" to include hazardous waste, pathological waste, and sludge. The ordinance defines "acceptable waste" to include "[a]ll residential, commercial and industrial solid waste as defined in New York State Law, and Regulations, including Construction and Demolition Debris" and excluding "Hazardous Waste, Pathological Waste [and] Sludge." See Town of Clarkstown, Local Law 9, § 1 (1990), *quoted in* Pet. Cert. at 48a-49a.

[2] The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. By "negative" implication, the several States do not have the power to regulate commerce and therefore may not interfere with the free flow of interstate trade through unduly restrictive or protectionist regulation. *See, e.g., H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 535 (1949).

purely isolationist and protectionist effect — an effect with harmful and far-reaching consequences for the nation's industry, economy, and environment.

To the extent that prior decisions by some lower courts reject this reasoning and can be read as supportive of the Clarkstown ordinance and similar "flow control" laws, those decisions are demonstrably unsound. This Court therefore should expressly reject the Commerce Clause jurisprudence espoused by such decisions.

ARGUMENT

I. IF UPHELD, THE CLARKSTOWN ORDINANCE COULD HAVE HARMFUL, FAR-REACHING EFFECTS ON BOTH INTERSTATE COMMERCE AND THE ENVIRONMENT.

Affirmance of the lower court's decision in this case would have two immediate effects with severely harmful long-term consequences. First, such a ruling would mean, by definition, that local jurisdictions may force consumers and businesses alike to patronize local disposal facilities at a monopoly price without any demonstration that those facilities are more efficient, more environmentally sound, or safer than available, non-local alternatives. Indeed, the record here reveals both (a) that the legislatively subsidized Town facility is substantially more expensive than the alternative offered by Petitioners ($81 per solid ton *versus* $70 per solid ton) and (b) that the Town has offered no proof or even a suggestion that its facility is a superior operation.

If ordinances like Clarkstown's are upheld, waste management could become the latest vehicle through which local jurisdictions address their revenue shortfalls. Precisely at a time when our society is becoming more concerned about the propriety of its disposal sites and methods, parochial financial

concerns would be elevated over environmental and safety concerns, and the already sizeable costs of waste disposal would increase — both in the near term and in the long term — with no cognizable offsetting benefit.

Second, upholding the Clarkstown ordinance would put communities and businesses that otherwise compete with the Clarkstown facility at a distinct disadvantage, which would likely result in a pattern of retaliatory (or, at least, like-minded) legislation.[3] This is one of the principal scourges that the Commerce Clause was intended to prevent. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (noting that the Framers of the Constitution were motivated, when drafting the Commerce Clause, by the conviction that "the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

The combined costs of the proliferation of such legislation to the nation's industry, economy, and environment would be enormous. In response to several recent trends — including the already spiraling expenses of waste disposal, increased environmental legislation at both the state and federal levels, and heightened public concern about the environment — thousands of industrial corporations, including many represented by the present *amici*, have invested millions of dollars and tremendous energy to develop more efficient, state-of-the-art disposal facilities and techniques. In many

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[3] Certain communities and locations are simply ill-equipped to handle the disposal of wastes, and it is a geologic, geographic, economic, and legal reality that some of these communities and locations will never be able to develop the capacity to handle wastes. If upheld, the Clarkstown ordinance could lead to a nationwide trend that produces a perverse incentive for some of these communities to attempt to internalize their waste, as a means of generating revenue and competing with surrounding communities. Conversely, if similar flow control laws proliferate, some of these communities that properly should export their wastes may be unable to find suitable disposal sites.

cases, these efforts have resulted in the intracompany consolidation and centralization of once dispersed operations that now use less energy and less space than previous operations or that use sophisticated equipment not economically available in multiple locations. To require these businesses — which bring considerable expertise and resources to bear on waste-related issues and which greatly appreciate the environmental and legal ramifications of the subject — to dispose of all wastes in the jurisdictions where those wastes are generated would undermine these extremely positive developments and increase the costs of waste management and disposal throughout industry by an unfathomably large factor.

Inevitably, these new costs would have to be passed on to the society at large, in the form of higher prices, diminished investment capital, decreased salaries and employment opportunities, and an overall lowering of the nation's competitive standing in the global economy. State and local governments might temporarily ensure their own economic stability, but only at the expense of the economic stability of the interdependent nation as a whole.

II. SECTION 5 OF THE CLARKSTOWN ORDINANCE UNCONSTITUTIONALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE BY FLATLY FORBIDDING THE IMPORTATION OF "UNACCEPTABLE" WASTE.

The enactment of protectionist legislation to govern the disposal and management of wastes is a growing and disturbing national trend. The Court addressed at least two products of this trend last Term, in complementary decisions that invalidated waste import restrictions. *See Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992). In the present

case, Petitioner focuses on a waste *export* restriction, but to properly understand the constitutional vice in that restriction, one must begin with the Court's reasoning and recent decisions involving waste import laws. In fact, the present case itself involves an import restriction — Section 5 of the Clarkstown ordinance — which is invalid under the express terms of the Court's recent rulings.[4]

Section 5 of the Clarkstown ordinance states in pertinent part:

> It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside

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[4] Because Petitioners' business does not involve the importation of "unacceptable" waste for final disposal inside Clarkstown (*see* Pet. Cert. at 4.), the Petition for Certiorari focused on the export prohibition embodied in Section 3 and only cursorily addressed the import prohibition embodied in Section 5. Nonetheless, the Court may and should also address the constitutionality of Section 5. The Court has recognized its power to address substantially related questions in the past. *See* Sup. Ct. R. 14.1(a); *Procunier v. Navarette*, 434 U.S. 555, 560 n.6 (1978) ("our power to decide is not limited by the precise terms of the question presented"); *see also Vance v. Terrazas*, 444 U.S. 252, 259 n.5 (1980). It also has recognized the propriety of exercising that power in circumstances similar to those presented here. *See Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382-83 n.6 (1983) (relationship between two Commerce Clause challenges "close enough" for one not specifically raised in petition to be considered "subsidiary question fairly included therein").

Moreover, as the lower courts' opinions reveal, neither those courts nor Petitioners differentiated between the import restriction and the export restriction when addressing the constitutionality of the ordinance below. *See* Pet. Cert. at 29a (trial court); *see* Pet. Cert. at 11a-12a (appellate division). Accordingly, Respondent cannot claim to be prejudiced in having to address both arguments here. *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 371-72 n.4 (1967).

In any event, the Court's Rules provide that, "[a]t its option, . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Sup. Ct. R. 24.1(a); *see Silber v. United States*, 370 U.S. 717 (1962).

> the territorial limits of the Town of Clarkstown, except for [1] acceptable waste disposed of at a Town operated facility . . . and [2] recyclables . . . brought to a recycling center established by special permit . . . .

Town of Clarkstown, Local Law 9, § 5(A) (1990), *quoted in* Pet. Cert. at 53a. On its face, this provision constitutes a blanket prohibition against the importation of "unacceptable" waste and a nearly blanket prohibition against the importation of other forms of waste. Under the express terms of this Court's recent decisions in *Fort Gratiot Landfill* and *Chemical Waste Management*, as well as its earlier decision in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), such a prohibition is clearly unconstitutional.

In the *Philadelphia* case, this Court recognized that "[a]ll objects of interstate trade merit Commerce Clause protection," including forms of waste, and it struck down a New Jersey law that burdened interstate commerce in waste. 437 U.S. at 622; *see also Fort Gratiot Landfill*, 112 S. Ct. at 2023 ("[s]olid waste, even if it has no value, is an article of commerce"). The law at issue was remarkably similar to Section 5(A) of the Clarkstown ordinance at issue here. It prohibited, with a few narrow exceptions, the importation of "'any solid or liquid waste which originated or was collected outside the territorial limits of the State.'" 437 U.S. at 618 (quoting New Jersey statute).

Both that law and Section 5(A) are also remarkably similar to the Michigan law that the Court invalidated last year in *Fort Gratiot Landfill*. That law forbade private landfill operators from accepting solid waste that is generated outside of the county in which their facilities are located. The New Jersey and Michigan laws could not withstand constitutional scrutiny for the same reason that Section 5(A) cannot withstand it here: on its face, the provision

discriminates against objects in interstate commerce that originate outside of the local jurisdiction.

In the present case, Clarkstown has not even suggested a valid basis for treating waste generated outside of its territorial limits any differently from waste generated within, and there is no evidence before the Court to suggest that there is any qualitative difference between foreign waste and local waste of the same kind sufficient to justify the distinction. *See Chemical Waste Management*, 112 S. Ct. at 2015 (invalidating hazardous waste disposal fee imposed only on hazardous waste generated out-of-state in part because "there is absolutely no evidence before this Court to suggest that waste generated outside [the local jurisdiction] is more dangerous than waste generated in [the local jurisdiction]"); *see also Fort Gratiot Landfill*, 112 S. Ct. at 2027.

The Court therefore should hold Section 5(A) unconstitutional, *a fortiori*, under the express terms of its prior decisions.

III. SECTION 3 OF THE CLARKSTOWN ORDINANCE IMPOSES AN UNCONSTITUTIONAL BURDEN ON THE FREE FLOW OF INTERSTATE COMMERCE BY FLATLY FORBIDDING THE EXPORTATION OF "ACCEPTABLE" WASTE.

Section 3 of the Clarkstown ordinance violates the Commerce Clause for reasons similar to those that apply to Section 5. Section 3 states in pertinent part:

> C. All acceptable waste generated within the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility . . . or to such other

disposal or recycling facilities operated by the Town of Clarkstown . . . .

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.

Town of Clarkstown, Local Law 9, § 3(C)-(D) (1990), *quoted in* Pet. Cert. at 52a.

A. The Ordinance's Restriction on Exportation Is No Less Insidious and Unconstitutional Than Its Restriction on Importation.

The court below concluded that the Clarkstown ordinance does not violate the Commerce Clause because it "applies evenhandedly to all solid waste processed within the Town, regardless of point of origin." Pet. Cert. at 11a. There are two flaws in this conclusion. First, the fact that the ordinance treats all waste that is *processed* within the Town evenhandedly is no answer to the fact that it discriminates in requiring such in-town processing in the first place. As demonstrated above, the import prohibition embodied in Section 5 plainly and facially discriminates against waste originating beyond the Town's limits. The export prohibition embodied in Section 3 similarly discriminates against waste that is headed for destinations out of town.

Second, the court's conclusion belies a fundamental misunderstanding of the nature and scope of the Commerce Clause's protections. In essence, the court's opinion appears to suggest that import restrictions and export restrictions do not stand on equal constitutional footing and that while the former may run afoul of the Constitution, the latter, in similar circumstances, may not.

This Court has never subscribed to such reasoning. Rather, the Court's decisions have recognized that a restriction on exports is no less of an imposition on interstate commerce than a restriction on imports.[5] A local law may violate the Commerce Clause not only by discriminating against classes or objects of trade *originating* in a foreign jurisdiction but also by discriminating against classes or objects of trade that are *destined* for a foreign jurisdiction. For example, in the leading case of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Court unanimously held that an Arizona law that restricted the export of cantaloupes violated the Commerce Clause.

The law at issue in *Pike* prohibited the shipment of Arizona-grown cantaloupes out of state in bulk containers and required that they "'be packed in regular compact arrangement in closed standard containers approved by the [state] supervisor.'" 397 U.S. at 138 (quoting Arizona statute). In an argument similar to Respondent's arguments here, the State of Arizona argued that its export restriction "imposes no burden on interstate commerce" because, "[i]f the Arizona Act is complied with, . . . all that will be regulated will be the intrastate packing of goods destined for interstate commerce." *Id.* at 140. In rejecting this contention, the Court noted that, "[i]f the [State's] theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge[, and y]et such statutes have been consistently invalidated by this Court under the Commerce Clause." *Id.* at 141-42 (citing five prior

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[5] *See, e.g., South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Johnson v. Haydel*, 278 U.S. 16 (1928); *Foster-Fountain Packing, Co. v. Haydel*, 278 U.S. 1 (1928).

Supreme Court decisions). Writing for the Court, Justice Stewart explained:

> [T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.

Id. at 145 (citations omitted). Numerous decisions both before and since *Pike* have invalidated export restrictions on similar grounds. *See supra*, note 5.

In short, in this Court's Commerce Clause jurisprudence, "what is ultimate is the principle that one State in its dealings with another may not place itself in a position of economic isolation," and the Court has been no more hesitant (and, in fact, less hesitant) to strike down isolationist barriers when they come in the form of export restrictions than when they come in the form of import restrictions. *Baldwin v. GAF Seelig, Inc.*, 294 U.S. 511, 527 (1935).

B. The Town Has Not Met Its Burden of Demonstrating that the Ordinance Is Supported By a Valid Factor Unrelated to Economic Protectionism.

If a local law discriminates against items in interstate commerce, the local government that passed it bears the burden of proving that "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 801 (1992). Clarkstown has not met this burden.

The Town purports to have a legitimate governmental purpose for enacting the ordinance, as the ordinance itself suggests. Section 2 of the ordinance states in part:

> The powers and duties enumerated in this law constitute proper town purposes intended to benefit the health, welfare and safety of Town residents. Additionally, it is hereby found that, in the exercise of control over the collection, transportation and disposal of solid waste, the Town is exercising essential and proper governmental functions.

Town of Clarkstown, Local Law 9, § 2(A)(II) (1990), *quoted in* Pet. Cert. at 53a. Both courts below found this legislative affirmation to be sufficient. As the Appellate Division noted:

> Local governments have long been authorized to enact laws relating to the "safety, health and well-being of persons or property" and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments, is fundamentally related to the public health and welfare.

Pet. Cert. at 9a (quoting New York Constitution) (citations omitted).

As this Court recently explained in *Chemical Waste Management*, however, empty rhetoric cannot carry the local jurisdiction's burden. *See* 112 S. Ct. at 2014 (finding that "only rhetoric, and not explanation, emerge[d]" in support of the discriminatory Alabama law at issue). Here, the Town has presented absolutely no evidence to prove or even to attempt to prove that the export restriction in question furthers "the health, welfare and safety of Town residents." Indeed, it is clear that the export restriction in Section 3 has even less legitimacy than the import restriction in Section 5 and the other import restrictions that this Court has repeatedly held

invalid. In the import restriction cases, the enacting jurisdictions are motivated by a desire to exclude allegedly inferior products from their markets or, in cases involving waste, by a desire to prevent trash generated by other jurisdictions from landing in their backyards. Arguably, such motivations are facially valid legislative purposes. *See Chemical Waste Management*, 112 S. Ct. at 2017-19 (Rehnquist, C.J., dissenting). Here, however, it is inconceivable that the ordinance furthers the asserted governmental interests. The export restriction at issue mandates the *retention of waste* within the local jurisdiction; waste retention cannot possibly promote the "health, welfare and safety of Town residents."

In short, it is apparent that the true legislative motivation underlying Section 3 is the purely protectionist desire to enhance Town revenues by monopolizing the business of solid waste management within the town limits in order to guarantee the viability of the Town-designated facility — at least (and only) to the extent that "acceptable," non-hazardous materials are involved. Indeed, thus far, the Town has not actually argued otherwise, and it certainly has not carried its burden of proving otherwise.

C. Even If It Is Supported by Valid Local Interests, Section 3 Still Violates the Commerce Clause Because It Imposes an Excessive, Protectionist Burden Upon Interstate Commerce.

This Court "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (citations omitted). The facts here indisputably suggest that Petitioners' interstate operation is more efficient than the Town's local operation,

and, as explained above, the counterproductive and anticompetitive effects of the prohibition are substantial.

Moreover, even if the Court were to find that the ordinance does advance legitimate local interests and that it is not illegal *per se*, the Court still should hold it unconstitutional. If a local law that promotes legitimate purposes substantially burdens interstate commerce, the question becomes whether those purposes "could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142; *see Hughes*, 441 U.S. at 336. The enacting jurisdiction then has the burden of demonstrating the ineffectiveness of less discriminatory and less burdensome alternatives. Here, the Town has not borne that burden.[6]

IV. THIS COURT SHOULD EXPRESSLY REJECT THE REASONING OF LOWER COURTS THAT ARE SUPPORTIVE OF THE CLARKSTOWN ORDINANCE AND SIMILAR "FLOW CONTROL" LAWS.

The decisions of the New York State courts in this case are not unique. Approximately one half of the nation's state legislatures have authorized their local communities to enact flow control legislation; a substantial number of local communities have done so;[7] and several federal and state

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[6] For example, the Town has not demonstrated that charging competitive rates would fail to attract sufficient revenues to support the Town-designated facility. Nor has it demonstrated the ineffectiveness of supplementing any such revenue shortfalls through appropriate taxes or utility charges. (Of course, if these alternatives would be ineffective, the appropriate conclusion may be that the Town's facility is inefficient and should not continue to operate.)

[7] *See generally*, U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* (Sept. 1988) (discussing the increasing popularity and restrictive effects of local flow control legislation); C. Baird Brown, "A Checklist for Legally Enforceable

courts have upheld the resulting legislation against constitutional challenges. *See, e.g., J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection*, 857 F.2d 913 (3d Cir. 1988); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *In re Fiorillo Bros.*, 577 A.2d 1316 (N.J. Super. Ct.), *review denied*, 585 A.2d 371 (N.J. 1990); *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369 (D. Del. 1985).

All of these decisions are strikingly and disturbingly similar in two respects. First, by misapprehending the enormous and increasing complexity of the business of waste management, they consistently understate the effects of flow control laws on interstate commerce, characterizing those effects as ephemeral or incidental. *See, e.g., J. Filiberto*, 857 F.2d at 922 (finding that solid waste hauler had "shown no cognizable burdens on interstate commerce from the Rule requiring processing of trash at [the county's] transfer station"); *Hybud Equip. Corp.*, 654 F.2d at 1194 (finding that "[t]he effect on commerce [of an ordinance requiring patronage of a local solid waste facility in order to guarantee the economic feasibility of that facility] is minimal"); *Fiorillo Bros.*, 577 A.2d at 1323 (finding that "[t]he regulatory schemes dealing with New Jersey's garbage crisis when viewed as a whole do not burden interstate commerce").

Second, these decisions uniformly demonstrate a failure to appreciate that export restrictions are no less discriminatory and burdensome than import restrictions. The courts in these cases repeatedly focus on the fact that flow control laws apply evenhandedly within in the *local* market — wholly ignoring the incontestable fact that they still substantially burden

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Obligations To Use Disposal Services," *printed in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* (1988).

commerce by preventing interstate carriers and foreign waste management facilities from respectively transporting and receiving waste that otherwise would come to them. *See, e.g., J. Filiberto*, 857 F.2d at 921 (stating that "[t]o the extent that the transfer station garners for itself all of the county's trash for disposal at a landfill, an activity previously performed by haulers, the effect falls equally on in-state as well as out-of-state haulers *operating in Hunterdon County*") (emphasis added); *Hybud Equip. Corp.*, 654 F.2d at 1194 (stating that "Akron's legislation does not have the effect of taxing or preventing competition by non-residents" *within Akron*); *Harvey & Harvey*, 600 F. Supp. at 1379 (stating that the challenged act and regulations "do not discriminate between in-state and out-of-state disposal facilities" because they only govern the in-state facility).

In short, because the effects of flow control legislation on interstate commerce are enormous and because, as export restrictions, they are no less discriminatory and burdensome than import restrictions, this Court should expressly address and reject the Commerce Clause jurisprudence embraced by those courts that would appear to uphold the constitutionality of the ordinance at issue here.

As the jurisprudence of these courts proliferates, so do similar flow control laws and similarly subsidized waste disposal facilities. The result is a growing overcapacity of such facilities accompanied, ironically, by monopoly prices. And with increasing frequency, the interests represented by the present *amici* find themselves held captive to local, protectionist interests with literally no recourse.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Appellate Division of the New York Supreme

Court, Second Department, and hold the Clarkstown ordinance unconstitutional.

Respectfully submitted,

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